Pacific Bunkers Pte Ltd v Owners of The Ships or Vessels 'Geniki Sarawak' and 'Geniki Johor' (No 2) and another case

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO 27NCC–18–04 OF 2014
WONG KIAN KHEONG JC
3 JULY 2015

Civil Procedure — Amendment — Judgment — Plaintiff obtained summary judgments in two admiralty actions in rem against defendant — Applications for summary judgment did not pray for costs for arrest of defendant's two ships in the suits — Sealed copies of judgments extracted by defendant without plaintiff's knowledge did not include arrest costs — Whether plaintiff had shown it was entitled to arrest costs and could amend sealed judgments to include same — Whether application to amend allowable under O 20 r 11 of the Rules of Court 2012 ('the RC') as interpreted by Federal Court in Sang Lee Co Sdn Bhd v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services) [2010] 5 MLJ 285 — Whether court not functus officio in setting aside sealed judgments as they were invalid for being perfected without compliance with mandatory provisions of O 42 rr 8(3) and (4) of the RC — Whether defendant's solicitor's firm liable to pay costs of applications to amend/set aside the sealed judgments

In the two suits herein, the plaintiff was granted two summary judgments ('two summary judgments') against the defendant for monies owing for the supply of marine fuel oil and gas for the defendant's two ships, Geniki Sarawak and Geniki Johor. On the plaintiff's application, the court, through the Sheriff, arrested the two ships as security for the plaintiff in the two suits. However, in its two summary judgment applications, the plaintiff failed to apply for the costs involved in the arrest of the ships ('the arrest costs') and the same was not included in the two summary judgments. The plaintiff's first draft of the two summary judgments drawn up by its solicitor and sent to the defendant's solicitor was approved and returned by the latter within two days. On realising the arrest costs were not in the first draft, the plaintiff's solicitor sent a second draft to the defendant's solicitor which included the arrest costs. The defendant's solicitor disagreed with the second draft stating that the arrest costs were not granted by the court. Thereafter, without informing the plaintiff's solicitor, the defendant's solicitor filed in court drafts of the two summary judgments as per the approved first draft and subsequently extracted sealed copies of the same ('two sealed judgments') which made no mention of the arrest costs. Meanwhile, unaware of what the defendant's solicitor had done, the plaintiff's solicitor wrote to court (copying the letter to the defendant's solicitor) for an appointment before the judge who had heard the matter to 'clarify' the terms of the two summary judgments pursuant to O 42 rr 8(3) and

(4) of the Rules of Court 2012 ('the RC'). When the parties appeared before the judge and a dispute arose over whether the court had jurisdiction to review/revisit the two summary judgments, the court directed the plaintiff to file two notices of application ('the two applications') supported by affidavits to amend the two summary judgments. It was only about a week after the plaintiff's solicitor had filed the two applications that the defendant's solicitor informed the former that they had already extracted the two sealed judgments. At the hearing of the two applications, the plaintiff's counsel orally applied for the two sealed judgments to be set aside. The defendant contended that (a) the two sealed judgments were lawfully perfected pursuant to O 42 r 10(4) of the RC when the plaintiff's solicitor failed to act on receiving the approved first draft from the defendant's solicitor, and (b) the court was *functus officio* and could not review the two sealed judgments or set them aside.

Held, applications allowed with costs borne by defendant's solicitor:

(1) Based on case law, the court was satisfied that the plaintiff had security in the two arrested ships in the two actions in rem to ensure that its claim, costs (including arrest costs) and interest were paid. Accordingly, once the plaintiff obtained the two summary judgments, it was entitled to the arrest costs (see para 59).

(2) As the plaintiff was entitled to the arrest costs upon obtaining the two summary judgments and there had been an accidental slip or omission by the plaintiff in not including the arrest costs in its summary judgment applications, the plaintiff could resort to the second limb of O 20 r 11 of the RC to amend the two summary judgments to include orders for the registrar to assess the arrest costs. The Federal Court in *Sang Lee Co Sdn Bhd v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services)* [2010] 5 MLJ 285 gave a wide interpretation to O 20 r 11 whereby that provision could be relied upon to amend a sealed judgment or order (see paras 43 & 60–61).

(3) Once the contents of the two summary judgments were disputed by the parties, the terms of the two judgments could only be settled by the court in accordance with O 42 rr 8(3) and (4) of the RC. In view of the mandatory effect of those provisions, the defendant should not have merely sent its draft judgments to the senior assistant registrar and the latter should not have issued the two sealed judgments without the parties appearing before the court to settle the terms of the two summary judgments. The two sealed judgments were, therefore, invalid for non-compliance with O 42 rr 8(3) and (4) of the RC and had to be set aside. It followed, that the *functus officio* doctrine did not apply. The doctrine could only be relied upon if the two sealed judgments were perfected in accordance with O 42 rr 8(3) and (4) of the RC (see paras 29–31 & 33).

(4) The defendant's reliance on O 42 r 10(4) of the RC was misplaced as that provision applied to orders and not judgments. The two cases here concerned two summary judgments and not orders. The plaintiff's solicitor had mistakenly drafted two orders and subsequently the solicitors for both parties had mistakenly proceeded on the two draft orders. As the court had granted two summary judgments, O 42 r 5(1) of the RC provided that Form 75 in Appendix A to the RC should be used for summary judgments (see paras 26 & 28).

(5) Although the two applications did not expressly pray for the setting aside of the two sealed judgments (because at the time of the filing of the applications the plaintiff did not know the defendant had filed the draft judgments in court), at the hearing, the plaintiff's counsel had orally applied for the setting aside. The applications also contained a prayer for the grant of any further or other order as the court deemed fit, just and proper. The two sealed judgments were set aside pursuant to the plaintiff's said oral application and the said general prayer for relief. If the two sealed judgments were not set aside it would be an injustice to the plaintiff which was out of time to appeal against the two summary judgments to include the arrest costs. The defendant could not be said to have been caught by surprise by the plaintiff's oral application as they should not have obtained the two sealed judgments behind the plaintiff's back in the first place (see paras 37–40).

(6) As to whether the defendant's solicitors should bear the costs of the plaintiff's two applications, the court was satisfied that the defendant's solicitor's firm was overall responsible for wasting costs by misconduct and/or by default (see paras 63 & 73–74).

[Bahasa Malaysia summary

Dalam dua guaman ini, plaintif telah diberikan dua penghakiman terus ('dua penghakim terus') terhadap defendan untuk wang yang terhutang bagi bekalan minyak petrol dan gas marin dua kapal defendan, Geniki Sarawak dan Geniki Johor. Atas permohonan plaintif, mahkamah, melalui sherif, telah menahan dua kapal tersebut sebagai jaminan untuk plaintif dalam dua guaman tersebut. Walau bagaimanapun, dalam kedua-dua penghakiman terusnya, plaintif telah gagal untuk memohon kos yang terlibat dalam penahanan kapal-kapal tersebut ('kos penahanan') dan ia tidak dimasukkan ke dalam dua penghakiman terus tersebut. Draf pertama untuk dua penghakiman terus plaintif telah dibuat oleh peguam caranya dan dihantar kepada peguam cara defendan yang diluluskan dan dikembalikan oleh peguam cara defendan dalam tempoh dua hari. Apabila menyedari kos penahanan itu tiada dalam draf pertama, peguam cara plaintif telah menghantar draf kedua kepada peguam cara defendan yang mana kos penahanan dimasukkan. Peguam cara defendan tidak bersetuju dengan draf kedua yang menyatakan kos penahanan tidak diberikan oleh mahkamah. Berikutan itu, tanpa memberitahu peguam cara plaintif, peguam cara

defendan telah memfailkan di mahkamah draf kedua-dua penghakiman terus sepertimana diluluskan dalam draf pertama dan kemudian mengekstrak salinan-saliann yang dimeteraikan ('kedua-dua penghakiman yang dimeterai') yang tidak menyatakan apa-apa tentang kos penahanan. Sementara itu, tanpa menyedari apa yang dilakukan oleh peguam cara defendan, peguam cara plaintif telah menulis kepada mahkamah (membuat salinan surat kepada peguam cara defendan) untuk satu temu janji di hadapan hakim yang mendengar perkara itu untuk 'clarify' syarat-syarat kedua-dua penghakiman terus itu menurut A 42 kk 8(3) dan (4) Kaedah-Kaedah Mahkamah 2012 ('KM'). Apabila pihak-pihak merayu di hadapan hakim dan pertikaian timbul berhubung sama ada mahkamah mempunyai bidang kuasa untuk menyemak semula/mengkaji semula dua penghakiman terus itu, mahkamah mengarahkan plaintif memfailkan dua notis permohonan ('dua permohonan tersebut') yang disokong oleh afidavit-afidavit untuk meminda kedua-dua penghakiman terus itu. Hanya lebih kurang seminggu selepas peguam cara plaintif memfailkan dua permohonan tersebut barulah peguam cara defendan memberitahu bahawa mereka telahpun mengekstrak kedua-dua penghakiman yang dimeterai itu. Semasa perbicaraan dua permohonan tersebut, peguam plaintif secara lisan telah memohon agar kedua-dua penghakiman yang dimeterai itu diketepikan. Defendan berhujah bahawa: (a) kedua-dua penghakiman yang dimeterai itu telah dengan sah disempurnakan menurut A 42 k 10(4) KM apabila peguam cara plaintif gagal bertindak apabila menerima draf pertama yang diluluskan daripada peguam cara defendan; dan (b) mahkamah adalah *functus officio* dan tidak boleh menyemak semula kedua-dua penghakiman yang dimeterai itu atau mengetepikan kedua-duanya.

Diputuskan, permohonan-permohonan dibenarkan dengan kos ditanggung oleh peguam cara defendan:

(1) Berdasarkan kes undang-undang, mahkamah berpuas hati bahawa plaintif mempunyai jaminan dalam dua kapal yang ditahan itu dalam dua tindakan in rem bagi memastikan bahawa tuntutan, kos (termasuk kos penahanan) dan faedahnya dibayar. Sewajarnya, apabila plaintif telah memperoleh kedua-dua penghakiman terus itu, ia berhak mendapat kos penahanan (lihat perenggan 59).

(2) Oleh kerana plaintif berhak mendapat kos penahanan itu apabila memperoleh kedua-dua penghakiman terus itu dan terdapat keciciran atau peninggalan oleh plaintif kerana tidak memasukkan kos penahanan dalam permohonan penghakiman terusnya, plaintif boleh menggunakan cabang kedua A 20 k 11 KM untuk meminda kedua-dua penghakiman terus itu untuk memasukkan perintah-perintah bagi pendaftar menaksir kos penahanan itu. Mahkamah Persekutuan dalam kes *Sang Lee Co Sdn Bhd v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services)* [2010] 5 MLJ 285 memberi tafsiran meluas untuk A 20 k 11 di mana peruntukan tersebut boleh digunakan untuk meminda

penghakiman atau perintah yang dimeteraikan (lihat perenggan 43 & 60–61).

(3) Setelah kandungan kedua-dua penghakiman terus itu dipertikaikan oleh pihak-pihak, syarat-syarat kedua-dua penghakiman itu hanya boleh diselesaikan oleh mahkamah menurut A 42 kk 8(3) dan (4) KM. Berdasarkan kesan mandatori peruntukan-peruntukan tersebut, defendan tidak patut hanya menghantar draf penghakimannya kepada penolong kanan pendaftar ('PKP') dan PKP tidak patut mengeluarkan kedua-dua penghakiman yang dimeterai itu tanpa pihak-pihak hadir di hadapan mahkamah untuk menyelesaikan syarat-syarat kedua-dua penghakiman terus itu. Kedua-dua penghakiman yang dimeterai itu, oleh demikian, adalah tidak sah kerana ketidakpatuhan dengan A 42 kk 8(3) dan (4) KM dan patut diketepikan. Adalah diikuti, bahawa doktrin *functus officio* tidak terpakai. Doktrin itu hanya boleh digunakan jika kedua-dua penghakiman yang dimeterai itu disempurnakan menurut A 42 kk 8(3) dan (4) KM (lihat perenggan 29–31 & 33).

(4) Kebergantungan defendan kepada A 42 k 10(4) KM tidak betul kerana peruntukan itu terpakai kepada perintah dan bukan penghakiman. Kedua-dua kes di sini adalah berkenaan dua penghakiman terus dan bukan perintah. Peguam cara plaintif telah tersilap mendraf dua perintah dan berikutan itu peguam cara kedua-dua pihak telah tersilap meneruskan dengan kedua-dua draf perintah tersebut. Oleh kerana mahkamah telah memberikan dua penghakiman terus, A 42 k 5(1) KM memperuntukkan bahawa Borang 75 dalam Lampiran A kepada KM patut digunakan untuk penghakiman terus (lihat perenggan 26 dan 28).

(5) Walaupun kedua-dua permohonan itu tidak dengan nyata memohon untuk diketepikan kedua-dua penghakiman yang dimeterai itu (kerana pada masa permohonan-permohonan difailkan plaintif tidak mengetahui yang defendan telah memfailkan draf penghakiman-penghakiman itu di mahkamah), semasa perbicaraan, peguam plaintif secara lisan telah memohon untuk pengenepian itu. Permohonan-permohonan itu juga mengandungi permohonan untuk pemberian apa-apa perintah selanjutnya atau lain sebagaimana yang difikirkan sesuai, adil dan wajar oleh mahkamah. Kedua-dua penghakiman yang dimeterai itu telah diketepikan berikutan permohonan lisan dan permohonan am untuk relief oleh plaintif. Jika kedua-dua penghakiman yang dimeterai itu tidak diketepikan ia adalah tidak adil kepada plaintif yang mana ia adalah di luar had masa untuk merayu terhadap kedua-dua penghakiman terus itu bagi memasukkan kos penahanan itu. Defendan tidak boleh dikatakan terkejut dengan permohonan lisan plaintif kerana mereka tidak sepatutnya memperoleh kedua-dua penghakiman yang dimeterai itu tanpa persetujuan plaintif (lihat perenggan 37–40).

(6) Berhubung sama ada peguam cara defendan patut menanggung kos dua permohonan plaintif itu, mahkamah berpuas hati bahawa firma peguam cara defendan secara keseluruhannya bertanggungjawab untuk kos pembaziran disebabkan oleh salah laku dan/atau oleh kegagalan (lihat perenggan 63 & 73–74).]]]

Notes

For cases on judgment, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 689–691.

Cases referred to

'Acrux', The [2004] 4 SLR 531, HC (refd)
Arktis Fighter, The [2001] 3 SLR 394, HC (refd)
'Bazias 3' and 'Bazias 4', The [1993] 2 WLR 854, CA (refd)
BSN Commercial Bank (M) Bhd v ZAQ Construction Sdn Bhd & Ors [2001] 4 MLJ 472, HC (folld)
'Eastern Lotus' Ex 'Spring Flower'; Urzad Morski W Szczecinie v Moscow Narodny Bank Ltd, The [1980] 1 MLJ 137, CA (refd)
'Evpo Agsa'; Continental Grain Co v Owners of The Ship Or Vessel 'Evpo Agsa', The [1992] 2 SLR 487, HC (refd)
Falcon, The [1981] 1 Lloyd's Rep 13, QBD (refd)
Gulf Venture, The [1984] 2 Lloyd's Rep 445, QBD (refd)
H156, The [1999] 3 SLR 756, HC (refd)
Harley & Anor v MacDonald [2001] 2 WLR 1749, PC (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312, SC (folld)
Karpal Singh v Atip bin Ali [1987] 1 MLJ 291, SC (refd)
Kimden Housing Development Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Bhd [1994] 3 MLJ 228, HC (refd)
Law Mun & Ors v Chua Lai Seng & Ors [1984] 2 MLJ 328 (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (refd)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)
'Margaret', The (1835) 166 ER 394 (refd)
Middle East Tankers and Freighters v Owner of The Vessel and other interested party in the vessel of MV 'Ira' [1996] 4 MLJ 109, HC (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)
Mohd Yusof bin Awang & Anor v Malayan Banking Bhd & Anor [1995] 4 MLJ 493, HC (refd)
Moschanthy, The [1971] 1 Lloyd's Rep 37 (folld)
Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd [1998] 7 MLJ 81; [1999] 1 CLJ 810, HC (refd)
Owners and/or other interested parties in The Indian Navy Ship or Vessel Ins 'Jyoti' at Bombay's Port Harbour v Owners and/or other interested parties in The Ship

or Vessel MV 'Yick Wing' registered in the Port of Panama [2001] 3 MLJ 549, HC (refd)

Pacific Bunkers Pte Ltd v Owners of the ships 'Geniki Sarawak' and 'Geniki Johor' (and another case) [2015] MLJU 136; [2015] 2 AMR 887, HC (refd)

Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor [1999] 4 MLJ 113, CA (refd)

Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd [1996] 5 MLJ 127, HC (refd)

Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd [2009] 6 MLJ 182; [2009] 6 CLJ 713, CA (refd)

Pembangunan Cahaya Tulin Sdn Bhd & Ors v Citibank Bhd [2008] 5 MLJ 200, CA (refd)

Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)

Phileoallied Bank (M) Bhd v Narendran s/o Thambimuthu [1999] 3 AMR 3721, HC (refd)

'Polo II', The [1977] 2 Lloyd's Rep 115, QBD (refd)

Ridehalgh v Horsefield & Anor [1994] Ch 205, CA (refd)

Sang Lee Co Sdn Bhd & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) [2010] 5 MLJ 285, FC (refd)

'Suhaili 5201' Sing Koon Seng Shipbuilding & Engineering Pte Ltd v The 'Suhaili 5201' (owners and other persons interested in), The [1988] 1 MLJ 210, CA (refd)

Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211 (refd)

Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Tang Liang Hong v Lee Kuan Yew & Anor & other appeals [1998] 1 SLR 97, CA (refd)

Tatchee Machinery Agency v Posan Timber Trading Sdn Bhd [1989] 1 MLJ 388, HC (refd)

Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679, SC (refd)

Legislation referred to

Civil Law Act 1956 ss 3, 3(1), 5(1)

Civil Procedure Rules 1998 [UK] r 40.3

Courts of Judicature Act 1964 s 24(a), (b)

Government Proceedings Act 1956 s 33(4)

National Land Code s 256(3)

Legal Profession Act 1976 ss 94(2), (3), 99(1), (3)

Rules of Court 2012 O 1 r 4(1), O 1A, O 2 r 1(2), O 20 r 11, O 42 r 5(1), O 42 rr 8, 8(1), (2), (3), (4), (5), O 42 rr 10, 10(4), (5), O 42 r 13, O 56 r 1(1), O 59 rr 6, 6(1) , (1)(a), (1)(b), (1)(c), (2), (3), (4), (5), (6), O 92 r 4 , Form 75

Rules of the High Court 1980 O 20 r 11, O 42 rr 8, 10, O 59 r 8, rr 8(1), (2), (3), (4), (5), (6), O 92 r 4

Rules of the Supreme Court 1965 [UK] O 42 rr 5, 5A, 6
Senior Courts Act 1981 [UK] ss 20(1)(a), (2)(m) , 21(4)(a), (4)(b)

Oon Thian Seng (Wiwin bt Abdul Kahar and Nurul Nadiah bt Zabidi with him) (TS Onn & Partners) for the plaintiff.
Yeoh Cho Kheong (Alvin TK Chang with him) (Iqbal Hakim Sia & Voo) for the defendant.

Wong Kian Kheong JC:

INTRODUCTION

[1] The above two cases ('the two cases') are heard together

[2] On 20 November 2014, this court granted summary judgment for the plaintiff company (plaintiff) against the defendant company (defendant) in the two cases (two summary judgments). The grounds for the two summary judgments have been reported in *Pacific Bunkers Pte Ltd v Owners of the ships 'Geniki Sarawak' and 'Geniki Johor' (and another case)* [2015] MLJU 136; [2015] 2 AMR 887 ('*Pacific Bunkers (No 1)*').

[3] In *Pacific Bunkers (No 1)*, at p 892, I have started by saying that the two cases have been fought to the hilt as the defendant has filed three interlocutory applications in each of the two cases to resist the plaintiff's summary judgment application, namely the defendant has filed in each of the two cases, a striking out application, an application to stay the hearing of the summary judgment application and an application for security for costs. I concluded my judgment in *Pacific Bunkers (No 1)*, at p 917, as follows:

> In closing, it should be recorded that the defendant has filed every conceivable application and forwarded every thinkable argument to resist the summary judgment applications.

[4] When I expressed the above statements in *Pacific Bunkers (No 1)*, I did not expect there were events subsequent to the two summary judgments which required a determination of the following issues:

(a) when there was a dispute between the parties regarding the contents of the two draft summary judgments ('the two drafts'), could the defendant's solicitors forward the two drafts to the learned senior assistant registrar of the High Court ('the SAR') without the knowledge of the plaintiff's solicitors and obtain the sealed copies of the two summary judgments ('the two sealed judgments) before the judge could settle the terms of the two drafts under O 42 rr 8(3) and (4) of the Rules of Court 2012 ('the RC')?

(b) does the judge (who has granted the two summary judgments) have the jurisdiction to hear two applications by the plaintiff to set aside the two sealed judgments and to amend the two summary judgments? In particular, is the judge barred by the doctrine of *functus officio* from re-visiting the two sealed judgments?

(c) if the judge is not barred by the *functus officio* doctrine from reviewing the two sealed judgments, should the judge set aside the two sealed judgments and amend the two summary judgments to include the costs incurred by the plaintiff in the arrest of two ships in the two cases? and

(d) should the defendant's solicitors personally bear costs under O 59 r 6(1)(c) of the RC of the plaintiff's applications to set aside the two sealed judgments and to amend the two summary judgments?

BACKGROUND

[5] The defendant is the registered owner of two ships, namely 'Geniki Sarawak' and 'Geniki Johor' ('the two ships').

[6] By two written agreements, the plaintiff has agreed to sell and the defendant has agreed to purchase marine fuel oil and marine gas oil for the two ships.

[7] Invoices have been issued by the plaintiff to the defendant for the payment of the plaintiff's supplies of marine fuel oil and marine gas oil to the two ships. The defendant has not paid for these invoices. Hence, the plaintiff filed actions in rem in the two cases against the defendant.

[8] In the two cases, the plaintiff has applied for and obtained warrants from this court to arrest the two ships as security for the plaintiff's suits. These warrants have been executed by the 'Sheriff' (O 1 r 4(1) of the RC defines the 'Sheriff' as the Registrar of the High Court and the subordinate court). The two ships are now in the custody of this court.

[9] In the plaintiff's applications for two summary judgments, the plaintiff did not apply for the costs of arrest of the two ships ('the arrest costs'). Accordingly, when the two summary judgments were granted by this court on 20 November 2014, arrest costs were not included in the two summary judgments.

[10] By way of a letter dated 24 November 2014, the plaintiff's solicitors, Messrs TS Oon & Partners ('Messrs TSOP'), forwarded a draft of the two summary judgments (first drafts) to the defendant's solicitors, Messrs Iqbal, Hakim Sia & Voo ('Messrs IHSV'). The first drafts omitted the arrest costs.

[11] Messrs IHSV amended the first drafts ('the amended first drafts') and forwarded the amended first drafts to Messrs TSOP by way of Messrs IHSV's letter dated 26 November 2014. The amended first drafts stated, among others, as follows:

> UPON THE APPLICATION of the ~~Defendant~~ Plaintiff (the deletion had been made by Messrs IHSV and the underlined word was written by hand by Messrs IHSV) through the Notice of Application dated ...
>
> IT IS HEREBY ORDERED THAT summary judgment be given for the Plaintiff against the Defendant for the following:
>
> (a) Principal sum of US$ ...
>
> (b) Contractual interest on the sum of US$ ....; and
>
> (c) Costs for the sum of RM4,000 (the underlined words had been hand written by Messrs IHSV)
>
> ~~AND IT IS HEREBY ORDERED that the costs of the present application for the sum of RM4,000 is paid by the Defendant to the Plaintiff~~. (the deletion had been made by Messrs IHSV)

[12] Messrs TSOP realised their oversight regarding the arrest costs and sent a letter dated 2 December 2014 to Messrs IHSV with a second draft of the two summary judgments which included the arrest costs (second drafts).

[13] Messrs IHSV did not agree to the second drafts and sent a letter dated 3 December 2014 to Messrs TSOP (Messrs IHSV's letter dated 3 December 2014) stating, among others, as follows:

> We refer to the above matter and your letter dated 02/10/2014 (should be 2.12.2014) with enclosure of your amended draft order.
>
> *Kindly take note that we are not in agreement as to costs stated in the said draft order. STRICTLY following the Court Order, there is no any other costs to your client other than the costs mentioned in your previous draft order, ie RM4,000.00.*
>
> *Attached herewith is our duly amended draft order to be approved by Court. ...* (Emphasis added.)

[14] Without informing Messrs TSOP, Messrs IHSV:

(a) drew up the amended first drafts for the two summary judgments (defendant's draft judgments); and

(b) presented the defendant's draft judgments to the senior assistant registrar ('SAR') and obtained the two sealed judgments on 31 December 2015.

[15] In blissful ignorance of the fact that Messrs IHSV had already drawn up the defendant's draft judgments, Messrs TSOP sent a letter dated 5 January

2015 to the SAR to fix a date before me to 'clarify' the two summary judgments (Messrs TSOP's letter dated 5 January 2015). Messrs TSOP's letter dated 5 January 2015 was properly copied to Messrs IHSV. It is to be noted that despite receiving Messrs TSOP's letter dated 5 January 2015, Messrs IHSV did not inform Messrs TSOP that Messrs IHSV had prepared the defendant's draft judgments.

[16] Upon receipt of Messrs TSOP's letter dated 5 January 2015, I fixed 22 January 2015 to hear learned counsel regarding the settlement of the terms of the two summary judgments pursuant to O 42 rr 8(3) and (4) of the RC.

[17] On 22 January 2015:

(a) Ms Jessica Teng Pei Wen ('Ms Teng') appeared for the plaintiff while the defendant was represented by Mr Alvin TK Chang ('Mr Chang'). Mr Chang acted for the defendant in *Pacific Bunkers (No 1)*;

(b) Ms Teng submitted that this court has jurisdiction to review the two summary judgments while Mr Chang has contended otherwise; and

(c) I directed the plaintiff to file two notices of application supported by affidavits, to amend the two summary judgments. This is firstly because of the requirement of O 20 r 11 of the RC. I will discuss the application of O 20 r 11 of the RC subsequently in this judgment. Furthermore there is a conflict in the position of both parties and it is therefore necessary for this court to refer to the correspondence between Messrs TSOP and Messrs IHSV.

TWO APPLICATIONS BY THE PLAINTIFF

[18] On 30 January 2015 the plaintiff filed applications in court encls 114 and 116 (two applications) to amend the two summary judgments in these two cases.

[19] Messrs IHSV extracted the two sealed judgments on 31 January 2015 but did not inform Messrs TSOP of such an extraction. Nor did Messrs IHSV forward a copy of the two sealed judgments to Messrs TSOP. As such, Messrs TSOP did not know about the two sealed judgments at the time of the filing of the two applications.

[20] On 4 February 2015, Messrs TSOP received two letters dated 2 February 2015 from Messrs IHSV enclosing two draft indexes ('draft indexes') of records of appeal (the defendant has appealed to the Court of Appeal against the two summary judgments). The draft indexes indicated two sealed judgments. At that time, the two applications had not been heard and Messrs TSOP thought the draft indexes erroneously stated that the two sealed

judgments had been extracted. As such, Messrs TSOP sent a letter dated 4 February 2015 to Messrs IHSV with the amendment to the draft indexes (stating that there were disputes regarding the contents of the two summary judgments).

[21] On 6 February 2015, Messrs TSOP received a letter dated 5 February 2015 from Messrs IHSV which informed Messrs TSOP that the two sealed judgments had already been obtained by Messrs IHSV (Messrs IHSV's letter dated 5 February 2015). Only upon receipt of Messrs IHSV's letter dated 5 February 2015 on 6 February 2015, did Messrs TSOP become aware of the two sealed judgments.

[22] Messrs IHSV sent a letter dated 10 February 2015 to Messrs TSOP which enclosed the two sealed judgments (Messrs IHSV's letter dated 10 February 2015). In reply to Messrs IHSV's letter dated 10 February 2015, Messrs TSOP sent a letter dated 17 February 2015 to Messrs IHSV to object to the two sealed judgments.

WHETHER TWO SEALED JUDGMENTS HAVE BEEN LAWFULLY PERFECTED?

[23] The following provisions of O 42 rr 8 and 10 of the RC are relevant:

Order 42 rule 8 *Preparation of judgment or order*

(1) *Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor, if any, of the other party who shall within two days of the receipt thereof, or within such extended or abridged time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.*

(2) When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.

(3) *In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.*

(4) *Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge or Magistrate, any party may require the matter in dispute to be referred to the Judge or Magistrate for his determination.*

(5) *Where the other party has no solicitor, the draft shall be submitted to the Registrar.*

Order 42 rule 10 *Drawing up and entry of judgment and order*

A (1) Where a judgment given in a cause or matter is presented for entry in accordance with this rule at the Registry, it shall be entered by an officer of the Registry in the book kept for the purpose.

(2) *The party seeking to have such a judgment entered shall draw up the judgment and present it to the proper officer of the Registry for entry.*

B

(3) On entering any such judgment, the proper officer shall file the judgment and return a duplicate thereof to the party who presented it for entry.

(4) *Every order required to be drawn up shall be drawn up by the party in whose favour the order has been made and if that party fails to draw up the order within seven days after it is made, any other party affected by the order may draw it up.*

C

(5) The order referred to in paragraph (4) shall, when drawn up, be produced at the Registry, together with a copy thereof, and when passed by the proper officer, the order, sealed with the seal of the Court, shall be returned to the party producing it and the copy shall be lodged in the Registry. (Emphasis added.)

D

[24] Mr Chang submitted that the two sealed judgments had been lawfully E perfected by reason of the following:

(a) Messrs IHSV were entitled to draw up the defendant's draft judgments under O 42 r 10(4) of the RC after:

(i) Messrs IHSV had amended and approved the first drafts, ie the F amended first drafts; and

(ii) since Messrs TSOP had failed to draw up judgments based on the amended first drafts, Messrs IHSV drew up the defendant's draft judgments under O 42 r 10(4) of the RC; and

G (b) Messrs IHSV then presented the defendant's draft judgments to the SAR who sealed them and issued the two sealed judgments under O 42 r 10(5) of the RC.

[25] Firstly, I should point out that our O 42 rr8 and 10 of the RC are H different from the following English rules :

(a) O 42 rr 5, 5A and 6 of the Rules of the Supreme Court 1965 ('the RSC'); and

I (b) r 40.3 of the Civil Procedure Rules 1998 ('the CPR'). The RSC have now been replaced by the CPR.

Accordingly, English cases on the preparation and filing of judgments and orders, are not applicable to the interpretation of O 42 rr 8 and 10 of the RC.

[26] Mr Chang's reliance on O 42 r 10(4) of the RC, with respect, is misplaced as that provision applies to 'orders' and not 'judgments'. The two cases here concern two summary judgments and not 'orders'. I cite the Supreme Court's judgment given by Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, at p 319, as follows:

> At any rate, in our view, *for the purpose of O 42 r 10(1) a draft judgment is not a judgment since a draft implies that it needs perfection and approval.* It follows that the argument that the judgment was entered when the draft was filed for the approval of the senior assistant registrar and that the date of filing the fair judgment could be related back to the date when the draft copy of the judgment was filed was not correctly grounded and could not be sustained and we reject it as being without basis. *The weakest point in the appellants' arguments was on the submission that the learned judge did not take into consideration r 10(4) and (5). The answer to this is simple. Rule 10(4) and (5) are only clearly applicable to orders and not to the judgments and the learned judge was absolutely right to ignore the two subrules.* (Emphasis added.)

Hasil Bumi Perumahan Sdn Bhd concerned, among others, the application of O 42 rr 8 and 10 of the then applicable Rules of the High Court 1980 ('the RHC'). As O 42 rr 8 and 10 of the RHC are in pari materia with O 42 rr 8 and 10 of the RC, I am bound by the Supreme Court's judgment in *Hasil Bumi Perumahan Sdn Bhd* as a matter of stare decisis.

[27] In *Phileoallied Bank (M) Bhd v Narendran s/o Thambimuthu* [1999] 3 AMR 3721, at p 3730 (*Narendran*'s case):

> (a) the plaintiff bank entered into a consent judgment with the defendant in the plaintiff bank's debt recovery suit;
>
> (b) the plaintiff bank then applied to the High Court (charge action) for an order for sale of the defendant's land which had been charged to the plaintiff bank under the National Land Code ('the NLC');
>
> (c) the plaintiff bank took five years to draw up the consent judgment; and
>
> (d) Kamalanathan Ratnam J dismissed the charge action on the ground, among others, that the plaintiff bank's five-year delay in drawing up the consent judgment under O 42 r 10 of the RHC constituted a 'cause to the contrary' under s 256(3) of the NLC.
>
> With respect, there was no discussion in *Narendran*'s case of the earlier Supreme Court's judgment in *Hasil Bumi Perumahan Sdn Bhd*. As explained above, I am bound by *Hasil Bumi Perumahan Sdn Bhd.*

[28] In these two cases, Messrs TSOP mistakenly drafted two 'orders'. Subsequently, both Messrs TSOP and Messrs IHSV have mistakenly proceeded on the two draft 'orders'. As this court has granted the two summary

judgments, O 42 r 5(1) of the RC provides that Form 75 (para (g)) in Appendix A to the RC, should be used for summary judgments – please see the judgment of VC George J (as His Lordship then was) in *Tatchee Machinery Agency v Posan Timber Trading Sdn Bhd* [1989] 1 MLJ 388, at p 388.

[29] Once the contents of the two summary judgments are disputed by both parties, as is clear from Messrs IHSV's letter dated 3 December 2014 and Messrs TSOP's letter dated 5 January 2015, the terms of the two summary judgments can only be settled by the court in accordance with O 42 r 8(4) of the RC. This is clear from the following cases:

(a) in *Sang Lee Co Sdn Bhd v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services)* [2010] 5 MLJ 285, at p 292, Zulkefli FCJ (as His Lordship then was) delivered the following judgment of the Federal Court:

> [3] *It is our considered view that the Court of Appeal erred, in law and in fact, in failing to consider that O 42 r 8 of the RHC 1980 was never complied with in the present case which had resulted in the error on the face of the record. The draft ad interim order prepared by the plaintiff's solicitors was never approved by the defendants' solicitors. In fact the defendants' solicitors upon receipt of the draft ad interim order had informed the plaintiff's solicitors of their objection and had sought an appointment with the deputy registrar or with the judge pursuant to O 42 r 8 of the RHC 1980 to sort out the terms of the ad interim order.*
>
> ...
>
> [5] *Under O 42 r 8 of the RHC 1980 it is clear that if there is a dispute on the matter, any party may seek an appointment with the registrar to settle the terms and if the matter is heard by the judge the dispute may be determined by the judge. This is to safeguard the sanctity and authenticity of the final perfected sealed order and the court records. It is also to ensure that it accurately captures the very essence and terms of the order pronounced by the High Court.* (Emphasis added.)

(b) in *Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor* [1999] 4 MLJ 113 at pp 119–120:

> (i) the respondents' solicitors drew up a draft order of the Federal Court which was not agreed by the appellant's solicitors;
>
> (ii) instead of seeking an appointment with the Registrar of the Federal Court to settle the terms of the draft order of the Federal Court, the respondents' solicitors sent both draft orders of the Federal Court (prepared by solicitors for the appellant and respondent) to the Registrar of the Federal Court for approval; and
>
> (iii) the Registrar of the Federal Court approved the draft order sent by the respondents' solicitors and sealed the order

without fixing an appointment for learned counsel for all parties to settle the terms of the draft order of the Federal Court before the presiding judge.

The Court of Appeal in a judgment given by Haidar JCA (as His Lordship then was) decided at p 120 in *Parasuraman*:

> *Being aware of the disagreement to the terms of his draft order, instead of applying for an appointment to the Registrar of the Federal Court, as required by the rules of procedure, what En Visvanathan did was merely to send his draft order as well as En Francis Nathar's draft order to the Registrar of the Federal Court for approval. What En Visvanathan did was definitely wrong in view of r 3 of the Rules of the Federal Court 1995 and O 42 r 8(3) and (4) of RHC.*
>
> ...
>
> *Either En Visvanathan or En Francis Nathar should have sought an appointment with the judge (in this case the presiding judge) for the dispute to be determined. In this case we are of the view that En Visvanathan should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when En Francis Nathar sent his own draft order to him. It was not for the registrar to resolve the dispute in their absence. Unfortunately the problem was compounded by the registrar taking upon herself to approve the draft order submitted by En Visvanathan and therein lies the root of the problem. We must say here that had counsel complied with the rules pertaining to the terms of the draft order in dispute much of judicial time would not have been wasted in sorting the terms of the order of the Federal Court and the present appeal would thus have been unnecessary.* (Emphasis added.)

(c) in the High Court case of *Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd* [1996] 5 MLJ 127 at pp 130–132, Arifin Jaka J (as His Lordship then was) held as follows:

> It is also not in issue that as usual the plaintiff's counsel sent a copy of the draft order to the defendant's counsel for approval. The draft order was indorsed with a notice pursuant to O 45 r 7(4)(b) of the RHC and in the form as provided for in Form 87 therein.
>
> ...
>
> *The defendant's counsel objected to the indorsement of the notice in the said order. The draft order was returned to the plaintiff's counsel with the amendment that the notice indorsed thereon be deleted. Despite the objection, the plaintiff's counsel went ahead with the perfection of the said order.*
>
> *The issue before this court is whether the notice should be endorsed on the said order and the defendant's counsel was wrong in deleting it from the draft order.*
>
> ...
>
> On receipt of the amended draft order from the defendant's counsel, the

plaintiff's counsel hurriedly wrote a letter to the Timbalan Pendaftar on 8 August 1995 enclosing two copies of the draft order and insisted that the endorsement of the said order with the notice be allowed to stand.

...

It is clear that the senior assistant registrar was persuaded by the contention of the plaintiff's counsel as stated in the letter dated 8 August 1995 and allowed the notice to be endorsed on the said order and perfected the order accordingly. The defendant's counsel was not given an opportunity to explain why he objected to the endorsement. In a situation such as this it is strictly essential that either party should refer this matter in dispute to the judge for his determination pursuant to O 42 r 8(4) of the RHC.

...

In this instant case it cannot be denied that there is a dispute between the parties on the endorsement of the said order with the notice and this dispute was never referred to the judge for his determination before the order was perfected by the senior assistant registrar. I am of the view that before the said order was perfected the dispute must be settled before the judge. This has not been done which is in contravention of O 42 r 8(4) of the RHC. Under these circumstances I am of the view that the said order was not properly perfected. The court is not functus officio in hearing this application as it is not asked to alter, vary or set aside an order after it has been drawn up but only to settle the order under O 42 r 8(4).

...

In consequence I order that the said order be re-drawn and perfected accordingly. (Emphasis added.)

[30] It is clear from *Sang Lee Co Sdn Bhd*, *Parasuraman* and *Patricia Liew Yam Ngoon* that all disputes regarding the terms of an order or judgment, shall be settled by the court, either by the 'registrar' (defined in O 1 r 4(1) of the RC) or the judge, under O 42 rr 8(3) and (4) of the RC.

[31] In view of the mandatory effect of O 42 rr 8(3) and (4) of the RC as interpreted in *Sang Lee Co Sdn Bhd*, *Parasuraman* and *Patricia Liew Yam Ngoon*:

(a) the defendant should not have merely sent the defendant's draft judgments to the SAR; and

(b) the SAR should not have issued the two sealed judgments without the parties appearing before this court to settle the terms of the two summary judgment in accordance with O 42 rr 8(3) and (4) of the RC. Accordingly, the two sealed judgments are not valid for not complying with the mandatory provisions of O 42 rr 8(3) and (4) of the RC and should therefore be set aside.

[32] My understanding of O 42 rr 8 and 10 of the RC and the cases which have interpreted these provisions, is as follows:

(a) O 42 r 8 of the RC does not apply to default judgments. In *Hasil Bumi Perumahan Sdn Bhd*, at p 319, the Supreme Court decided as follows:

> *In our view, in a case under O 19 r 3, as is the case in this appeal, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O 42 r 8.* What was done here was ex abundanti cautela. *The relevant rule applicable in the instant case is r 10(1), (2) and (3). The solicitors for the appellants need only to draw up the judgment under r 10(2) and present it to the senior assistant registrar for entry and, under r 10(1), the senior assistant registrar should enter it in the cause book kept for that purpose.* Under this sub-rule, on entering such judgment, the senior assistant registrar should file the judgment and return the duplicate thereof to the appellants' solicitors. It must, however, also be emphasised here that at the time of entering the judgment, the prescribed court fees under O 91 for entry of such judgment must first be paid by means of the prescribed praecipe which will be duly registered and impressed on the copy of the judgment. The praecipe in this case was registered on the day the fees were paid and the judgment should only be entered after the payment of the prescribed fees. There was uncontroverted evidence that the judgment was entered on 19 April 1991, the day it was presented and signed by the senior assistant registrar after the prescribed fees had been paid. It should also be obvious from the above that the determining factor for the purpose of deciding when such judgment is entered under O 42 r 10 is the payment of the prescribed court fees without which the judgment could not be entered and signed by the senior assistant registrar. *The senior assistant registrar was labouring under a mistaken belief that he was under a duty to accept the draft judgment and sign it for approval. At any rate, in our view, for the purpose of O 42 r 10(1) a draft judgment is not a judgment since a draft implies that it needs perfection and approval.* (Emphasis added.)

(b) when one party is not represented by solicitors, O 42 r 8(5) of the RC allows the other party's solicitors to prepare a draft order or judgment and submit the draft directly to the registrar;

(c) the party in whose favour an order or judgment is given (winning party), should draft the order or judgment. This is clear from the following cases:

(i) in *Law Mun & Ors v Chua Lai Seng & Ors* [1984] 2 MLJ 328, at p 334, Shankar J (as His Lordship then was) held as follows:

> This order was made for the first defendant's benefit and at his request. His solicitor acted upon and furnished the guarantee accordingly. The duty to extract the order fell upon him (see O 42 r 8). How this obligation is to be enforced is not entirely clear (see *Mallal's Supreme Court Practice* 2nd Ed p 494) but I cannot see how the first defendant's solicitor's omission can be prayed in aid of the situation here.

(ii) Abdul Aziz J (as His Lordship then was) decided as follows in the High Court case of *BSN Commercial Bank (M) Bhd v ZAQ Construction Sdn Bhd & Ors* [2001] 4 MLJ 472, at pp 478–479:

> *The purpose of O 42 r 8 of the RHC is to provide the procedure, subsequent to the giving of a judgment (or the making of an order), for the settling of the terms of the judgment, in order to obtain an instrument that may be regarded as a formal written certificate in proof of the judgment. The procedure requires the winning party to make the first move by submitting a copy of the draft instrument to the solicitor for the other party or, if the other party has no solicitor, to the registrar. No time limit is fixed for the winning party to do so.* If the winning party fails to make the first move, he will not obtain the instrument and will suffer the consequence that he will be at a disadvantage in the matter of doing or establishing something that requires the existence of the instrument. For example, if the plaintiff is the winning party, without the instrument, he may face difficulties in executing the judgment.
>
> *That being the purpose of O 42 r 8 of the RHC, in my judgment, the failure of the winning party to comply with the requirement of making the first move to obtain the certificate of the judgment cannot, in reason, have the consequence of marring the judgment itself, so as to merit its being set aside. The judgment remains good. The only consequence of the winning party's failure is that he will not get the certificate of the judgment. Moreover, since no time limit is provided for making the first move, technically it is not possible at any time to speak of failure to make the first move. Until the first move is made, it is proper to say that the first move has not yet been made, but it cannot be said that there has been a failure to make it, and therefore a non-compliance with O 42 r 8(1) of the RHC.* (Emphasis added.)

(d) if the winning party does not draft the order or judgment, the 'losing party' ('losing Party') may do so. It is to be noted that O 42 r 10(4) of the RC provides that the winning party should draw up the 'order' (not 'judgment' as explained in *Hasil Bumi Perumahan Sdn Bhd*) within seven days after the 'order' is made.

In *Narendran*'s case, the High Court has held that the plaintiff bank's five-year delay in drawing up a consent judgment under O 42 r 10 of the RHC, has adverse consequences for the plaintiff bank. As explained above, with respect, I am not inclined to follow *Narendran*'s case in view of the Supreme Court's judgment in *Hasil Bumi Perumahan Sdn Bhd*. I agree with *BSN Commercial Bank (M) Bhd*, there is no sanction provided by the RC if the winning party fails to draft the order or judgment; and

(e) if a draft order or judgment has been forwarded by one party's solicitor, be it for the winning party or the losing party, to the other party's solicitor:

(i) the other party's solicitor may expressly agree to the draft order or judgment within two days of receipt of the draft or

within time extended or abridged by the registrar (prescribed time) – O 42 r 8(1) of the RC;

(ii) if the other party's solicitor omits to return the draft order or judgment within the prescribed time, the other party is deemed under O 42 r 8(2) of the RC to have consented to the draft order or judgment – please see Richard Talalla J's judgment in the High Court case of *Kimden Housing Development Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Bhd* [1994] 3 MLJ 228, at p 230; or

(iii) if the other party's solicitor disputes the terms of the draft order or judgment within the prescribed time, O 42 rr 8(3) and (4) of the RC require the registrar or the judge to settle the terms of the draft order or judgment (settlement of draft) – *Sang Lee Co Sdn Bhd*, *Parasuraman* and *Patricia Liew Yam Ngoon*.

I am of the opinion that a settlement of draft under O 42 rre 8(3) and (4) of the RC do not empower the registrar or the judge to amend the draft order or judgment. My opinion is premised on the following reasons:

(A) the wording in O 42 rr 8(3) and (4) of the RC does not indicate that the court has any power to amend an order or judgment. As decided in *Sang Lee Co Sdn Bhd*, the purpose of O 42 rr 8(3) and (4) of the RC is to 'ensure that (the order or judgment) accurately captures the very essence and terms' of the order or judgment pronounced by the court.

In *Pembangunan Cahaya Tulin Sdn Bhd & Ors v Citibank Bhd* [2008] 5 MLJ 200, a majority of the Court of Appeal (Zaleha Zahari and Sulong Matjeraie JJCA (as Her Ladyship and His Lordship then were)) dismissed an application to amend an earlier order of the Court of Appeal on the following ground:

> *The question in issue here is whether this panel has the jurisdiction to settle an order allegedly to reflect the true order pronounced by a differently constituted panel?*
>
> The procedure to be adopted by parties in settling an order according to the rules is this: Where a party in whose favour an order is given is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor, if any, of the other party who shall within two days of the receipt thereof, return such copy with his signed consent or any required amendments. Should the solicitors concerned be unable to agree upon the draft, any one of them may obtain an appointment before the registrar (in this case the registrar of the Court of Appeal), of which notice shall be given to the other, to settle the terms of the order. In respect of an order made by the Court of Appeal, any party may require the matter in dispute to be referred to the presiding judge of the Court of Appeal which heard the appeal to settle the terms of the order.

> *My understanding from the feedback given by the registrar based on the record in the court file is that the prescribed procedure had in fact been observed. The terms of the sealed order that had been issued did in fact reflect the pronouncement made by the panel of the Court of Appeal on the date in question.*
>
> *Thus, notwithstanding the fact that there is a common member between that earlier panel and that of this panel (ie Datuk Suriyadi bin Halim Omar JCA), I am of the view that the respondent's counsel's attempt to seek an amendment by way of notice of motion to insert the words in the proposed amendment is misconceived. A differently constituted panel of Court of Appeal judges would not be in a position to know the actual pronouncement of the earlier panel as to the reason why an appeal had been allowed unless it had been expressly recorded. In the absence of an express recording to that effect, it was not open for this panel to grant an order in terms of the application.* (Emphasis added.)

(B) if a party wishes to amend an order or judgment, the party should file a formal application supported by affidavit (amendment application) as required by O 20 r 11 of the RC and not resort to O 42 rr 8(3) and (4) of the RC. As discussed later in this judgment, O 20 r 11 of the RC provides two alternative grounds for the court to amend an order or judgment (two grounds under O 20 r 11 of the RC). There should not be a circumvention of the two grounds under O 20 r 11 of the RC by resorting to O 42 rr 8(3) and (4) of the RC;

(C) the 'other party' has the right to oppose the amendment application by filing an affidavit in opposition and to persuade the court to dismiss the amendment application; and

(D) if a party does not file an amendment application and relies on O 42 rr 8(3) and (4) of the RC to amend an order or judgment, the 'other party' may be caught by surprise and may be prejudiced by an application to amend an order or judgment in the guise of a settlement of draft.

WHETHER COURT MAY RE-VISIT TWO SEALED JUDGMENTS?

Does functus officio doctrine bar review of two sealed judgments?

[33] Mr Chang has contended that this court is barred by the doctrine of *functus officio* from re-visiting, let alone to set aside, the two sealed judgments. With respect, I am not able to accede to this argument for the following reasons:

(a) the Federal Court decided as follows in *Sang Lee Co Sdn Bhd*, at p 293:

> [8] *A related issue which is raised in this appeal is the question of whether the court is functus officio when it purports to rectify and amend the sealed order to reflect what was actually pronounced. We are of the view in the light of a clear difference and discrepancy between the terms of the sealed order as compared with the actual*

order pronounced by the learned JC on 27 June 2006, it was only right and proper that the sealed order be amended accordingly pursuant to O 20 r 11 of the RHC 1980. (Emphasis added.)

I will discuss the application of O 20 r 11 of the RC later in this judgment; and

(b) the High Court held in *Patricia Liew Yam Ngoon*, at p 132, as follows:

Under these circumstances I am of the view that the said order was not properly perfected. The court is not functus officio in hearing this application as it is not asked to alter, vary or set aside an order after it has been drawn up but only to settle the order under O 42 r 8(4). (Emphasis added.)

According to *Patricia Liew Yam Ngoon*, since the two sealed judgments have been perfected contrary to O 42 rr 8(3) and (4) of the RC, the *functus officio* doctrine does not apply. The *functus officio* doctrine can only be relied on if the two sealed judgments have been perfected in accordance with O 42 rr 8(3) and (4) of the RC.

Does O 42 r 13 of the RC bar two applications?

[34] I have not overlooked O 42 r 13 of the RC which reads as follows:

Setting aside or varying judgment and orders

13. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him. (Emphasis added.)

[35] The question that arises is whether the plaintiff is barred by O 42 r 13 of the RC from applying to this court to set aside the two sealed judgments.

[36] I am of the view that O 42 r 13 of the RC does not bar the plaintiff from moving this court to set aside the two sealed judgments. This decision is premised on the following reasons:

(a) O 42 r 13 of the RC is subject to the mandatory provisions of O 42 rr 8(3) and (4) of the RC. This is clear from the phrase 'Save as otherwise provided in these Rules' in O 42 r 13 of the RC. In *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321, at p 340, Arifin Zakaria FCJ (as His Lordship then was) construed the phrase 'save as aforesaid' in s 33(4) of the Government Proceedings Act 1956 ('the GPA') as follows:

[51] *In my opinion the word 'save' as used in sub-s (4) (s 33(4) of the GPA) means 'except' or 'other than'* (see *Concise Oxford English Dictionary* 10th Ed).

> Therefore, 'Save as aforesaid' would mean that except or other than as provided in the preceding sub-ss (1), (2) and (3), no execution etc. shall be issued against the Government for enforcing payment of any judgment sum or costs as stated in the preceding sub-sections. (Emphasis added.)

(b) the two applications have been filed on 30 January 2015 before Messrs TSOP received the two sealed judgments. Order 42 r 13 of the RC only applies when Messrs IHSV have served the two sealed judgments on Messrs TSOP. As such, O 42 r 13 of the RC does not bar the two applications.

Is there a need for an express prayer to set aside two sealed judgments?

[37] As explained above, the two applications did not expressly pray to set aside the two sealed judgments because at the time of the filing of the two applications, the plaintiff did not know about the presentation of the defendant's draft judgments (which led to the two sealed judgments).

[38] On 15 April 2015, when this court heard the two applications, Mr Oon Thian Seng ('Mr Oon'), the plaintiff's learned counsel orally applied to set aside the two sealed judgments (plaintiff's oral application).

[39] It is to be noted that prayer 6 in the two applications pray for any further or other order as this court deems fit, just and proper (general prayer for relief). The following appellate cases have decided that the court has wide powers to grant any remedy when there is a general prayer for relief:

(a) in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, at p 160, Salleh Abas FJ (as His Lordship then was) delivered the following judgment of the Federal Court:

> From these two paragraphs of the statement of claim it is obvious that the respondent's solicitors treated the claim for loss of earnings as falling into two categories – (a) pre-trial loss, which they described it as 'loss of earnings' and (b) future loss of earnings, which they referred to as 'prospective loss of earnings.' *But instead of pleading the pre-trial loss of earnings or 'loss of earnings' as they described it as an item under special damages, they erroneously pleaded it as an item under general damages. This is purely a technical mistake, which in our view did not in any way affect the substance or prejudice the appellant* – see Order 2 (Effect of Non-Compliance) of the Rules of the High Court 1980. *We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in paragraph 5(a) should entitle the court to make such an assessment.* (Emphasis added.)

(b) *Lim Eng Kay* was followed by Gopal JCA (as His Lordship then was) in the Court of Appeal case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771, at p 301 (MLJ); pp 814–815 (CLJ):

> *In his statement of claim, the appellant has also prayed for 'further or other relief as this Honorable Court thinks fit'. In Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156*, 160, a prayer in a statement of claim read 'Any other relief which this Honourable Court deem fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.*
>
> *I am of the view that the same may be said of the like prayer in the present case. This Court should, in my judgement, award the appellant such relief as is appropriate in the circumstances of the case.*
>
> In arriving at this conclusion, I have not overlooked the decision in *Mokhtar v Arumugam* [1959] MLJ 232 (CA), where the following statement of principle from the judgement of Fry J in *Cargill v Bower* 10 Ch D 502, p 508 was applied:
>
> > You cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for.
>
> *As it happens, there is, in the present case, no inconsistency between the relief which I propose to award to the appellant and the other relief he has expressly claimed. For that reason, I abstain from deciding this case upon my own view of the wider role which, I believe, Courts should play in moulding relief to suit the justice of a particular case, especially in the field of public law.* (Emphasis added).

(c) in *Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd* [2009] 6 MLJ 182; [2009] 6 CLJ 713, at p 191 (MLJ); p 724 (CLJ), Zainon JCA (as Her Ladyship then was) affirmed *Lim Eng Kay* in the Court of Appeal as follows:

> [29] Further, in fairness to the respondent, prayer (18) in the statement of claim did contain a general prayer which had been upheld by the Federal Court to be effective in allowing courts to make such order as may be necessary to serve the ends of justice. Prayer (18) reads:
>
> > Lain-lain perintah yang difikirkan suai manfaat oleh mahkamah yang mulia ini.
>
> [30] In *Lim Eng Kay v Jaafar Mohamed Said* [1982] 2 MLJ 156; [1982]CLJ 298; [1982] CLJ (Rep) 190*, the plaintiff there had failed to plead pre-trial loss of earnings as special damages. However, the Federal Court held that the prayer for such 'other relief which the court deems fit to grant' was sufficient to enable the court to make an award of loss of earnings to the plaintiff. ...* (Emphasis added.)

[40] I set aside the two sealed judgments pursuant to the plaintiff's oral application and the general prayer for relief. This decision is based on the following reasons:

(a) the two sealed judgments have breached O 42 rr 8(3) and (4) of the RC;

(b) if this court does not set aside the two sealed judgments, there will be an injustice to the plaintiff. It is to be noted that the plaintiff is now out of time to appeal to the Court of Appeal against the two summary judgments (to include the arrest costs) according to r 12(c) of the Rules of the Court of Appeal 1994;

(c) the defendant cannot be said to be caught by surprise by the plaintiff's oral application as the defendant should not have obtained the two sealed judgments behind the plaintiff's back in the first place; and

(d) the setting aside of the two sealed judgments is not inconsistent with the two applications. In fact, such a remedy is in consonance with the purpose of the two applications.

WHETHER COURT HAS POWER TO AMEND TWO SUMMARY JUDGMENTS?

[41] Order 20 r 11 of the RC provides as follows:

> Clerical mistakes in judgment or orders, *or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.* (Emphasis added.)

[42] As stated above, O 20 r 11 of the RC is different from O 20 r 11 of the RHC because O 20 r 11 of the RC requires an amendment application to be made. Save for this difference, the two grounds under O 20 r 11 of the RC are the same as provided in O 20 r 11 of the RHC, namely:

(a) there is a clerical mistake in the judgment or order; or

(b) there is an error in the judgment or order arising from any accidental slip or omission.

[43] The Federal Court in *Sang Lee Co Sdn Bhd* has given a wide interpretation of O 20 r 11 of the RC whereby O 20 r 11 of the RC may be relied on to amend a sealed judgment or order (wide construction). It is to be noted that before *Sang Lee Co Sdn Bhd*, there were cases which gave a restrictive construction of O 20 r 11 of the RHC by deciding that the court's power under the then O 20 r 11 of the RHC could only be used if the judgment or order had not been perfected (restrictive interpretation). In view of *Sang Lee Co Sdn Bhd*, the restrictive interpretation may not be applicable now.

[44] I am of the respectful opinion that the wide construction can be supported by the following provisions of the RC: A

(a) O 1A of the RC provides that in administering the RC, including O 20 r 11 of the RC, the court 'shall have regard to the overriding interest of justice and not only to the technical non-compliance' with the RC; and B

(b) O 2 r 1(2) of the RC states that the RC are 'subject to the overriding objective of enabling the court to deal with cases justly' and all parties are required to assist the court to achieve this overriding objective.

C

[45] There are cases which have amended judgments and orders pursuant to the court's inherent jurisdiction, O 92 r 4 of the RHC (now O 92 r 4 of the RC) and even under s 3(1) of the Civil Law Act 1956 ('the CLA') (which allows Malaysian courts to apply English Common Law and Equity). For example, in *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd* [1998] 7 MLJ 81 at p 85 ; [1991] 1 CLJ 810 at p 815, Kamalanathan Ratnam J decided as follows in the High Court: D

> *Under The Inherent Jurisdiction Of The Court*
>
> *The historical origin of both the slip rule and the power to amend under the inherent jurisdiction of the court is very lucidly narrated by Robert Goff LJ in Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia, the Montan* [1985] 1 All ER 520 *wherein at pp 527–528 His Lordship said: ...* E
>
> ...
>
> *In the circumstances, pursuant to the provision of* s 3 of the Civil Law Act 1956*, the common law jurisdiction referred to in the Montan would similarly be applied here.* (Emphasis added.) F

[46] In view of an express provision in O 20 r 11 of the RC and the wide construction laid down by our Federal Court in *Sang Lee Co Sdn Bhd*, I am of the respectful view that there is no need to resort to the court's inherent jurisdiction, O 92 r 4 RC and/or s 3(1) of the CLA, to amend a judgment or order. In any event, the following two judgments of our apex court have decided that there should not be any reliance on the court's inherent jurisdiction when there is an express statutory provision: G H

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, at p 181; and

(b) the judgment of Zulkefli FCJ (as His Lordship then was) in the Federal Court case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307, at p 320. I

[47] Based on the above, this court may amend the two summary judgments to include the arrest costs if the plaintiff can satisfy the court of the following:

(a) the plaintiff is entitled to the arrest costs; and

(b) there was an accidental slip or omission by the plaintiff in failing to include the arrest costs in the two summary judgment applications.

WHETHER THE PLAINTIFF IS ENTITLED TO ARREST COSTS?

[48] Section 24(b) of the Courts of Judicature Act 1964 ('the CJA') provides that the High Court shall have 'the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 ('the SCA')'. It is to be noted that the SCA is now renamed the Senior Courts Act 1981 (to avoid confusion as the Supreme Court in England and Wales has replaced the House of Lords). This judgment will hereinafter use the abbreviation 'SCA' to refer to the Senior Courts Act 1981.

[49] Section 5(1) of the CLA states as follows:

> *In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of … carriers by … sea … and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue has arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.* (Emphasis added.)

Section 5(1) of the CLA allows Malaysian courts in West Malaysia (other than Malacca and Penang) to apply English shipping law on the 'date of the coming into force of' the CLA provided that there is no Malaysian written law in respect of the question at hand.

[50] The relevant provisions in the SCA are relevant to the two cases wherein the plaintiff has claimed for the cost of supply of marine fuel oil and marine gas oil to the two ships:

> *Section 20 SCA Admiralty jurisdiction of High Court*
>
> *(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say–*
>
> *(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);*
>
> *…*
>
> *(2) The questions and claims referred to in subsection (1)(a) are–*
>
> *…*

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

...

Section 21 SCA Mode of exercise of Admiralty jurisdiction

(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where–

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) *be brought in the High Court against–*

(i) *that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it* or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

(Emphasis added.)

[51] It is clear that the two cases filed by the plaintiff against the defendant are actions in rem by virtue of ss 20(1)(a), (2)(m) and 21(4)(a) and (b) of the SCA. Accordingly, by reason of s 24(a) of the CJA , the plaintiff may file the two suits in rem against the defendant in Malaysia. I refer to Haidar J's (as His Lordship then was) decision in the High Court case of *Middle East Tankers and Freighters v Owner of The Vessel and other interested party in the vessel of MV 'Ira'* [1996] 4 MLJ 109 which concerned an action in rem filed by a plaintiff claiming for cost of bunker fuel supplied to the ship in question.

[52] Mr Oon has submitted persuasively that once this court grants the two summary judgments in the plaintiff's two claims in rem, the plaintiff is entitled to arrest costs based on the following cases:

(a) the judgment of Brandon J (as His Lordship then was) in the English High Court case of *The Moschanthy* [1971] 1 Lloyd's Rep 37, at p 44, as follows:

The principle to be applied is, in my view, as follows: The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case. (Emphasis added.)

(b) in *The 'Suhaili 5201' Sing Koon Seng Shipbuilding & Engineering Pte Ltd v The 'Suhaili 5201' (owners and other persons interested in)* [1988] 1 MLJ 210, at p 222, the Singapore Court of Appeal in a judgment given

by Wee Chong Jin CJ, decided that the appellants (who had filed an action in rem claiming for cost of repair of the ship and had arrested the ship), were entitled to security in respect of their claim;

(c) Sinnathuray J held as follows in the Singapore High Court case of *'Eastern Lotus' Ex 'Spring Flower'; Urzad Morski W Szczecinie v Moscow Narodny Bank Ltd, The* [1980] 1 MLJ 137, at p 138:

> *The general principles of law governing priorities in admiralty proceedings, as administered in countries that follow the common law system, are well established. They have been developed over many decades by case law and settled admiralty practices. Broadly the order of priorities are as follows:*
>
> (1) Sheriff's charges.
>
> (2) *Plaintiff's costs of and incidental to the arrest of the vessel.*
>
> (3) Possessory lien.
>
> (4) Claim for salvage.
>
> (5) Damage claim arising from collision.
>
> (6) Wages and disbursements of master and crew.
>
> (7) Claim of mortgagee.
>
> *Then come the claims of the other interested parties.* (Emphasis added.)

The above ruling by Sinnathuray J in *The 'Eastern Lotus'*, has been affirmed on appeal by the Singapore Court of Appeal in a judgment given by Wee Chong Jin CJ [1980] 1 MLJ 137, at p 141;

(d) in *The Falcon* [1981] 1 Lloyd's Rep 13, at p 17, Sheen J decided as follows in the English High Court:

> *In my judgment, the proceeds of sale of a ship which has been sold by order of the Court should be used first to pay the Admiralty Marshall's charges and expenses; secondly to reimburse the plaintiff or plaintiffs who has or have incurred expense in preserving the property by arresting the ship and maintaining that arrest. Those expenses will of course include the necessary costs of that plaintiff up to the moment of that arrest.* (Emphasis added.)

(e) the judgment of Sir John Nicholl in *The 'Margaret'* (1835) 166 ER 394, at pp 394–395, was also cited in support of the above contention of the plaintiff.

[53] Learned counsel for both parties did not refer to the Malaysian High Court cases of *Middle East Tankers and Freighters v Owner of The Vessel and other interested party in the vessel of MV 'Ira'* [1996] 4 MLJ 109 and *Owners and/or other interested parties in The Indian Navy Ship or Vessel Ins 'Jyoti' at Bombay's Port Harbour v Owners and/or other interested parties in The Ship or Vessel MV 'Yick*

Wing' registered in the Port of Panama [2001] 3 MLJ 549.

[54] Haidar J (as His Lordship then was) approved of *The 'Moschanty'* in *MV 'IRA'*, at pp 119–120, as follows:

> *The defendant contended that the security provided by it through a third party for the release of MV 'IRA' is excessive and oppressive.* It is not disputed that there was negotiation between the parties as to the amount of security to be provided by the defendant. The guarantee dated 10 March 1995 is not a bank guarantee or a bail bond paid into court. It is simply a letter of undertaking given on behalf of the defendant by a third party. The sum of US$197,482.21 stated in the letter of undertaking was freely negotiated between the parties' solicitors. There is no evidence shown by the defendant that the said figure was literally pushed down its throat but rather the plaintiff's original figure of US$207,432.21 was subsequently agreed to be reduced to US$197,482.21. *It may be slightly on the high side but certainly it is not excessive and oppressive, having regard to the elements of interests and costs. In the result, I am of the opinion that the sum agreed for the security is reasonable. Therefore, I am not inclined to disturb it* (see *The 'Moschanthy'* [1971] Lloyd's Rep 37). (Emphasis added.)

[55] In *The 'Yick Wing'*, Azhar Maah J (as His Lordship then was) decided as follows, at pp 558–560:

> *The application of the defendants, as stated in encl 12, was to scale down the security that is now being held by the plaintiffs in the amount of US$7,244,479.* Details of this security have been itemised in paras 7 and 8 of the initial supporting affidavit of Khong Fat Yan for the defendants/applicant.
>
> ...
>
> *From the lengthy arguments advanced by both parties, it appears to me that the plaintiffs are entitled to security from the defendants regardless of who was responsible for the collision.*
>
> *It appears that quantum is the only issue that has to be determined in the present application.* There seems to be no argument from both parties as to the principle to be applied when the issue of liability is heavily in dispute.
>
> It is obvious that the plaintiffs had imposed their demand for security from the defendants on the strength of their own allegations and assumptions that the defendants were wholly responsible for the collision.
>
> It seemed to me that the plaintiffs had acted pre-emptively and they were quicker and faster in throwing the blame to the defendants for the collision and taking advantage of the process of law, and thus affecting the arrest on the defendants vessel.
>
> It is to be noted from the pleadings that the defendants did not only wholly dispute that they were responsible for the collision, but also averred that such collision was occasioned solely by the negligence of the plaintiffs and/or their agents. As such, a counterclaim has been filed.

With this scenario, a pertinent question that has to be asked is whether it is fair and justifiable for the plaintiffs to assert their demand for security as they did from the defendants. The authorities put to fore by both parties do not seem to pick this issue up as a point for discussion and deliberation. However, my view on this matter is that since the issue of liability for the collision has not been adjudicated, the plaintiffs had no right to take the stand and action as though the defendants have been adjudged as the guilty party.

A request for security that has to be made must be made reasonably, having regard to the circumstances of the incident and merits of the claim. The bottom line is still reasonableness.

In this instant case, after some negotiations and in order to have a quick release of their vessel, the defendants acceded to the plaintiffs' demand for security.

They entered into a private agreement with the plaintiffs and provided security for the release of Yick Wing.

Notwithstanding this, the defendants complained to this court now that the security was excessive. The plaintiffs said that following the principle in 'The Tribels' they were entitled to the top level of award which can be anticipated on the basis of their reasonably arguable best case. With respect, learned counsel in applying this principle to the present case has gone off at a tangent. This principle cannot be applied in the instant case for two reasons. Firstly, the facts of 'The Tribels' are poles apart from the facts of our case here.

Going by the facts of 'The Tribels' and that of the present case it is extremely clear that the issues raised in 'The Tribels' have no bearing whatsoever to the case before us here and is therefore irrelevant. *Secondly, in 'The Tribels', the liability of the master of 'The Tribels' towards the salvors for work done in salvaging the vessel was not at all in dispute.* The only issue that had to be determined was how much security was reasonable, taking into account the value of the property salved. *For the above reasons, I reiterate that the principle in 'The Tribels' ought not to be considered in relation to the present case.*

The defendants contended that the entitlement of the plaintiffs to security was on the basis of their reasonably best arguable case. The decisions in 'The Moschanthy', 'The Polo II' and 'The H 156' were the authorities relied upon in support of this proposition. With respect, I am unable to see how the principle in the above cases can be applied to the present case as there seems to be no resemblance of facts in them. Perusal of the above mentioned three cases will show that the action, of one party against the other was based on their contractual relationship by virtue of contracts that existed between them at that time. The actions for security in those cases were taken on the strength of the terms of the contracts which they alleged to have been agreed upon. In the instant case however, the plaintiffs affected the arrest of the defendants vessel and demanded payment for security for her release solely on the basis of their own belief and assumption that the defendants were the tortfeasors and were guilty in tort against them. In this regards, I must say that the plaintiffs were too presumptuous in their action. As the issue of 'who was right and who was wrong' is yet to be determined in a full trial, I do not think the plaintiffs have the right to cling on to the security furnished by the defendants.

This is more so as the defendants have already submitted to the jurisdiction of this court with regard to the plaintiffs' claim.

As a statement of general principle, a plaintiff may also give bail or other security, either to prevent the arrest of his property or to secure its release, where the defendant has a counterclaim which carries with it a right of arrest.

Coming back to the present case, notwithstanding what I have stated earlier, the decision of the defendants to accede to the plaintiffs' demand is purely a private matter and has nothing to do with the court. This court has been asked to interfere only in respect of the quantum.

In this regard, and in the light of the views that I have expressed earlier on examination of the items, the head of the security has become irrelevant. *It would be more appropriate in the circumstances for this court to order that the quantum of the security be reduced to an amount that has been conceded by the defendants in their submission, ie in the lump sum of US$3,802,497.09 which I now do.* (Emphasis added.)

[56] I have cited *in extenso* the judgment in *The 'Yick Wing'* as *The 'Yick Wing'* seems to have departed from the approach laid down in *The 'Moschanthy'*. *The 'Yick Wing'* could be explained on the ground that the High Court in that case, had recognised the security of the plaintiffs who had arrested the ship but the High Court nevertheless reduced the amount of security required for the release of the arrested ship. Furthermore, the judgment in *The 'Yick Wing'* did not refer to the earlier decision in *MV 'IRA'*.

[57] If *The 'Yick Wing'* is considered to be a departure from the legal position laid down in *The 'Moschanthy'*, with respect, I prefer to adopt the approach given in *The 'Moschanthy'* as followed in *MV 'IRA'*. My reasons are as follows:

(a) s 24(b) of the CJA and s 5(1) of the CLA allows Malaysian courts to follow English law on admiralty matters. I am not able to find any reason to depart from the legal position stated in *The 'Moschanthy'*;

(b) Singapore case law has adopted *The 'Moschanthy'*. There is no reason why Malaysian courts should adopt a stand which is different from that taken by Singapore courts; and

(c) as explained by Ong Hock Thye FJ (as His Lordship then was) in the Federal Court case of *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211, at p 213, the High Court is not bound by another judgment of the High Court.

[58] In view of the above reasons, I accept the aforesaid submission by Mr Oon. My research shows that *The 'Moschanthy'* has been followed by the following English and Singaporean cases (in chronological order):

(a) in *The 'Polo II'* [1977] 2 Lloyd's Rep 115, at pp 118–119, Brandon J (as His Lordship then was) decided as follows:

The nature of the proceeding appears from The 'Moschanthy' … where a similar

A *question arose. I took the view in that case that the Court had power to control the amount of security demanded by a plaintiff in an action in rem and that the control should be exercised on the principle that a plaintiff was only entitled to demand such an amount as security as would cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs.* (Emphasis added.)

B

(b) in the English High Court case of *The Gulf Venture* [1984] 2 Lloyd's Rep 445, at pp 446–447, Sheen J applied *The 'Moschanthy'*;

(c) GP Selvam JC's (as His Lordship then was) judgment in the Singapore C High Court in *'The Evpo Agsa'; Continental Grain Co v Owners Of The Ship Or Vessel 'Evpo Agsa'* [1992] 2 SLR 487;

(d) Lloyd LJ (concurred by Ralph Gibson and Butler-Sloss LJJ) in the English Court of Appeal case of *The 'Bazias 3' and 'Bazias 4'* [1993] 2 WLR 854 at pp 860–861, approved *The 'Moschanthy'*; D

(e) GP Selvam J's decision in *The H156* [1999] 3 SLR 756, in paras 21–22;

(f) in *The Arktis Fighter* [2001] 3 SLR 394, in para 7, Choo Han Teck JC (as His Lordship then was) applied *The 'Moschanthy'* ; and

E

(g) Belinda Ang Saw Ean J held as follows in *The 'Acrux'* [2004] 4 SLR 531, in paras 10 and 11:

10. The object of an in rem action is to recover, or to obtain security for, compensation for the complaint.

F

...

11. It is trite law that to avoid the arrest of a vessel or to secure the release of an arrested vessel, a proper security in the amount of the claim (based on the plaintiff's reasonably best arguable case), plus interest and costs, is required. There are advantages to both parties in the provision of security. The advantage to the defendant is that it will have secured the release of the vessel so that, in the present case, she can be delivered to the buyers. The advantage to the plaintiff is that it will have obtained security for its claim and that security will be unaffected by any other claims which might be brought against the vessel. At times, the parties may satisfy or compromise the claim and the vessel will be released accordingly. (Emphasis added.)

G

H

[59] Based on *MV 'IRA'*, English and Singaporean cases as elaborated above, I am satisfied that the plaintiff has security in the two ships in these two actions I in rem so as to ensure that the plaintiff's claim, costs (including arrest costs) and interest are paid. Accordingly, once the plaintiff has obtained the two summary judgments, the plaintiff is entitled to the arrest costs.

WHETHER TWO SUMMARY JUDGMENTS SHOULD BE AMENDED TO INCLUDE ARREST COSTS?

[60] As elaborated above, the plaintiff is entitled to the arrest costs upon obtaining the two summary judgments. There has been however an accidental slip or omission by the plaintiff in not including the arrest costs in their applications for the two summary judgments.

[61] I am satisfied that in these two cases, the plaintiff may resort to the second limb of O 20 r 11 of the RC to amend the two summary judgments to include orders for the registrar to assess the arrest costs.

[62] On 15 April 2015, after reading the written submissions of both parties and after listening to the oral submissions by Mr Oon and Mr Chang, I gave an oral judgment which:

(a) set aside the two sealed judgments;

(b) ordered an assessment of all the costs of the two cases, including the arrest costs, to be conducted by the registrar (assessed costs); and

(c) ordered the defendant to pay to the plaintiff interest at the rate of 5%pa on the assessed costs from the date of assessment until the date of full payment of the assessed costs.

[63] In respect of costs for the setting aside of the two sealed judgments (setting aside costs), Mr Oon orally proposed for the first time on 15 April 2015 that the defendant's solicitors should personally bear the setting aside costs (plaintiff's costs application).

[64] In view of the plaintiff's costs application, I adjourned the hearing of the plaintiff's costs application to 14 May 2015 for the following reasons:

(a) to enable Mr Chang to seek independent legal counsel or advice on the plaintiff's costs application; and

(b) to enable Mr Chang or his learned counsel to have sufficient time to respond to the plaintiff's costs application which has only been raised for the first time on 15 April 2015.

[65] I did not exercise my discretion under O 59 r 6(4) and (5) of the RC to give notice of the plaintiff's costs application to the Bar Council (BC) and the defendant for reasons which I will explain later in this judgment.

A WHETHER THE DEFENDANT'S SOLICITORS SHOULD PERSONALLY BEAR COSTS OF TWO APPLICATIONS?

[66] Order 59 r 6 of the RC provides as follows:

B *Personal liability of solicitor for costs*

6(1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible an order-

C (a) *disallowing the costs as between the solicitor and his client; and*

(b) *directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or*

(c) *directing the solicitor personally to indemnify such other parties against cost payable to them.*

D *(2) An order under this rule shall not be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made,* except where any proceeding in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made–

E (a) because of the failure of the solicitor to attend in person or by a proper representative; or

(b) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.

F (3) Before making an order under this rule the Court may, if it thinks fit, refer the matter to the Registrar for inquiry and report and direct to the solicitor in the first place to show cause before him.

(4) The Court may, if it thinks fit, direct or authorise the Bar Council to attend and take G *part in any proceedings or inquiry under this rule, and may make such order as it thinks fit as to the payment of its costs.*

(5) The Court may direct that notice of any proceedings or order against a solicitor under this rule shall be given to his client in such manner as may be specified in the direction.

(6) Where in any proceedings before the Registrar, the solicitor representing any H party is guilty of neglect or delay or puts any other party to any unnecessary expense in relation to those proceedings, the Registrar may direct the solicitor to pay costs personally to any of the parties to those proceedings.

(7) All references to 'Registrar' in this rule when applied in the Subordinate Court shall be read as referring to a Judge of the Sessions Court or a Magistrate. (Emphasis I added.)

[67] Order 59 rr 6(1)–(6) of the RC is similar to O 59 rr 8(1)–(6) of the RHC. Hence, cases on O 59 rr 8(1)–(6) of the RHC are relevant to the interpretation of O 59 rr 6 (1)–(6) of the RC.

[68] Order 59 r 6 of the RC is different from the following English rules of civil procedure:

(a) O 62 r 11 of the RC which provides for 'personal liability of legal representative for costs'; and

(b) r 44.14 of the CPR (court's power in relation to misconduct).

In view of the differences between O 59 r 6 of the RC and the English rules, English cases on solicitor's personal liability for costs, should be read with caution.

[69] Before expressing my view on the application of O 59 r 6 of the RC, I should highlight that the word 'and' between paras (a) and (b) of O 59 r 6(1) of the RC may give rise to confusion. In my view, all the three paras (a) to (c) in O 59 r 6(1) of the RC should be construed disjunctively as the court has a wide discretion to make any one of orders as provided in O 59 r 6(1)(a) to (c) of the RC.

[70] An application by any party for learned counsel or solicitor of another party (legal representative) to be personally liable for costs (costs application), has potentially grave consequences for the legal representative. This is because if the costs application is allowed by the court, the legal representative is not only penalised with a financial sanction in the form of costs but more detrimentally, the legal representative may also be additionally liable:

(a) for professional 'misconduct' within the meaning of s 94(3) of the Legal Profession Act 1976 ('the LPA') which may render the legal representative to sanctions (including being struck off the Roll of Advocates and Solicitors of the High Court of Malaya) imposed by the Disciplinary Board ('DB') under s 94(2) of the LPA; and/or

(b) the legal representative's client may institute a civil suit against the legal representative for breach of the retainer contract and/or for the tort of professional negligence.

I will discuss later the existence of the court's discretionary power to decline to invoke O 59 r 6 of the RC in view of possible injustice to the legal representative.

[71] My interpretation of O 59 r 6 of the RC and the cases applying O 59 r 8 of the RHC, is as follows:

(a) O 59 r 6(3) of the RC provides an option for the court to refer the costs application to be 'inquired' by the registrar (registrar's inquiry). I am not in favour of this option for these reasons:

(i) the costs application should be dealt with by the court from which

A the costs application emanates as the court is more conversant than the registrar in respect of the facts of the matter and the nature of the proceedings which gives rise to the costs application; and

(ii) a registrar's inquiry may incur more time, effort and costs for all the parties concerned. The decision of the registrar at the end of the registrar's inquiry may be the subject matter of an appeal to the judge under O 56 r 1(1) of the RC. Accordingly, there will be no expeditious and economical disposal of the costs application by directing a registrar's inquiry;

C (b) in view of the possibly adverse effect of the costs application on the legal representative, early notice with sufficient particulars of the grounds in support of the costs application should be given to the legal representative. In accordance with O 59 r 6(2) of the RC, the legal representative should be given reasonable time to appoint counsel of the legal representative's choice to advise and/or to represent the legal representative in the costs application.

The following cases demonstrate the importance of the above procedural safeguard for the legal representative:

E (i) in *Karpal Singh v Atip bin Ali* [1987] 1 MLJ 291, at p 291 Seah SCJ delivered the following judgment of the Supreme Court:

> *The first thing to remember is that an advocate and solicitor is an officer of the court and that his professional conduct is always under the supervision and scrutiny of the court. It follows that when there is dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself.* (Emphasis added.)

G (ii) Arifin Zakaria J (as His Lordship then was) decided as follows in the High Court case of *Mohd Yusof bin Awang & Anor v Malayan Banking Bhd & Anor* [1995] 4 MLJ 493, at pp 497–498:

> *This jurisdiction of the court is exercisable summarily upon application by originating summons, or motion or summons, or at the hearing of the proceedings*. (See 44 *Halsbury Laws of England* (4th Ed) para 252.)

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> *From the above authorities it may be gleaned that the court's jurisdiction over the matter is summary in nature and may even be made at the hearing of the proceedings itself, as it was done in the present case. The court, however, in exercising such jurisdiction should ensure that the advocate and solicitor against whom the application was made had due notice of the claim and he had sufficient opportunity to meet the claim as is reasonably necessary.*

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> *It is my view that the learned advocate and solicitor had sufficient notice of*

the application and has had sufficient opportunity, both before the SAR and before me, to put up his case why such order should not be made against him. (Emphasis added.)

If there is injustice to the legal representative, even if sufficient notice of the costs application has been given to the legal representative, I am of the view that the court should exercise its discretion not to apply O 59 r 6 of the RC and the court may then advise the party who has applied for the legal representative to be personally liable for costs (applicant), to lodge a complaint to the DB under s 99(1) of the LPA and/or to file a civil suit to claim damages from the legal representative. This view is premised on the opinion of the Privy Council given by Lord Hope on an appeal from New Zealand in *Harley & Anor v MacDonald* [2001] 2 WLR 1749, at pp 1768–1770, as follows:

48. *The next question is, what are the proper limits of that jurisdiction?* The Court of Appeal held that the inherent jurisdiction can be invoked only in cases where there has been a serious dereliction of the solicitor's duty to the court, and that it can be invoked only while the costs remain a live issue before the court which conducted the proceedings: [1999] 3 NZLR 545, p 560, paras 39, 42. Their Lordships agree, but for the purposes of their judgment the question as to its proper limits requires to be examined more closely.

49. *A costs order against one of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the court.* In *Myers v Elman* [1940] AC 282, p 319 Lord Wright described the court's inherent jurisdiction as to costs in this way:

> The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally ... The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.

The jurisdiction is compensatory in that the court directs its attention to costs that would not have been incurred but for the failure in duty. It is punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs.

50. *As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court.* Failures to appear, conduct which leads to an otherwise avoidable step in the

proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalise is then likely to be found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable.

51. Circumstances which involve serious breaches of the practitioner's duty to the court may however raise questions about his duty to the client which involve allegations of professional misconduct. They may also raise questions as to whether the practitioner is liable in damages to the client for negligence. *But it is not appropriate when considering whether or not to make a costs order for the court to rule upon whether, in addition to a breach of the duty to the court, there has been a breach of the rules of professional conduct. This is a matter which will ordinarily be dealt with by way of complaint under the disciplinary procedures of the 1982 Act. Nor is it appropriate for the court in exercising its summary jurisdiction to make a costs order to say whether the client has a cause of action against his barrister or solicitor for negligence. This is a matter which ought to be dealt with in separate proceedings, in which the issues of fact and law between the client and the practitioner are clearly focused and the practitioner is given a full and fair opportunity to respond to the client's claim.*

52. All this may seem to be elementary. But the distinction which must always be observed between these different processes is fundamental to a proper understanding of the limits of the inherent summary jurisdiction of the court. *The court's only concern when it is exercising this jurisdiction is to serve the public interest in the administration of justice.*

53. *Their Lordships do not say that the court has no jurisdiction to make a costs order in favour of the client against his own barrister or solicitor. But in cases where an order to that effect is contemplated the court must take great care to confine its attention to the facts which are clearly before it or to facts relating to the conduct of the case that are immediately and easily verifiable. Allegations that may raise questions about duties owed to the client by the barrister or solicitor and the conduct of the case outside the courtroom are unlikely to be of that character. They are likely therefore to fall outside the proper scope of that inquiry. The court must bear in mind that it is not its function, in the exercise of this jurisdiction, to adjudicate on the position as between the client and his barrister or solicitor.*

54. The court must have particular regard in cases of this kind to the factual basis upon which the jurisdiction is to be exercised. It cannot rely on its own knowledge when it is faced with issues about the nature or scope of the instructions which the client has given about the conduct of the litigation or the advice that may or may not have been tendered to the client by his barrister or solicitor. *Fairness to the barrister or solicitor requires that notice*

should be given of allegations about breaches of duty which raise these issues and that an opportunity should be given to them to challenge the allegations, if so advised, by cross-examining witnesses and leading evidence. These procedures are inconsistent with the summary nature of the jurisdiction. Bearing in mind the extra cost which an investigation of that kind may involve, and the overriding requirement of fairness to those who are at risk of being penalised, the court may well conclude that further investigation under this procedure is not appropriate. This need not be seen as a surrender by the court of its responsibility. The client may have other remedies. A complaint may be made to the Law Society leading to disciplinary sanctions against the barrister or solicitor, or a claim may be made by the client against the solicitor in damages for negligence. (Emphasis added.)

(c) the applicant bears the legal and evidential burden to prove cumulatively the following three conditions ('three conditions'):

(i) costs have been:

(A) incurred improperly;

(B) incurred without reasonable cause;

(C) wasted by undue delay;

(D) wasted by any other misconduct; or

(E) wasted by any other default

('five defaults');

(ii) the legal representative is responsible for any one or more of the five defaults – please see O 59 r 6(1) of the RC; and

(iii) even if there is evidence of the above two conditions, the applicant has to persuade the court to exercise its discretion in respect of the following three matters in the applicant's favour:

(A) the court should exercise its discretion to impose costs on the legal representative. The existence of the court's discretion is clear from the use of the word 'may' in O 59 r 6(1) of the RC;

(B) if the court has exercised its discretion to order costs to be paid personally by the legal representative, the court has a further discretion to decide whether the legal representative should bear all or part of the costs in question and the quantum of such costs; and

(C) whether the costs ordered by the court should be paid personally by the individual lawyer or by his or her firm.

I pause here to remind myself that each case in respect of the application or non-application of O 59 r 6(1) of the RC depends on its own particular facts concerning the three conditions. As such, cases which have decided solicitors to bear costs personally or otherwise, are not binding legal precedents. Having said that, I need to refer to three cases, one each from

A England, Singapore and New Zealand, which have explained the first condition (in respect of the five defaults) as well as the competing public policy considerations which the court should consider in applying O 59 r 6 of the RC.

B In *Tang Liang Hong v Lee Kuan Yew & Anor & other appeals* [1998] 1 SLR 97, at paras 70–72 and 78, the Singapore Court of Appeal in a judgment given by LP Thean JA followed Bingham MR's (as His Lordship then was) judgment in the English Court of Appeal case of *Ridehalgh v Horsefield & Anor* [1994] Ch 205, as follows:

C 70. *The provision governing the solicitor's personal liability for costs, or what is known as 'wasted costs order', is found in O 59 r 8 of the Rules of Court (similar to our O 59 r 6(1) of the RC) …*

71. The scope of this jurisdiction was comprehensively considered by the English Court of Appeal in *Ridehalgh v Horsefield & Anor* [1994] Ch 205 which dealt with a similar provision under English procedural law. *There, the court approved the three-stage test as conceived in the earlier case of Re A Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293 at p 301. The judgment of the court was handed down by Sir Thomas Bingham MR (as he then was) and the court laid down the three-stage test, at p 231:

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(1) *Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?*

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

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(3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs.)

G *There followed a detailed consideration by the court of what the first limb of the test means,* and the court said as follows, at pp 232–233:

> *'Improper' The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.*

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> *'Unreasonable' The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted*

differently. The acid test is whether the conduct permits of a reasonable explanation.

The term 'negligent' was the most controversial of the three. That expression does not invoke technical concepts of the law of negligence we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended.

72. Before us the matter has only reached the stage of a show cause order under sub-rule (2) of O 59 r 8 of the Rules of Court which states:

No order under this Rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made

A mention should be made on this sub-rule. We refer once again to the judgment of the Court of Appeal in *Ridehalgh*, which said, at p 239:

this (rule) should not be understood to mean that the burden is on the legal representative to exculpate himself. *A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not. But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has been made against him and the language of the rule recognises a shift in the evidential burden.*

We entirely agree.

...

78. Finally, it must be borne in mind that, in making a show cause order of this nature, the court also has to balance two important public interests. In *Ridehalgh*'s case, Sir Thomas Bingham MR phrased it in this manner at p 226:

One (public interest) is that lawyers should not be deterred from pursuing their clients' interest by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest is that litigants should not be financially prejudiced by

> *the unjustifiable conduct of litigation by their or their opponents' lawyers. The reconciliation of these public interests is our task in these appeals. Full weight must be given to the first of these public interests, but the wasted costs jurisdiction must not be emasculated.*
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> *We respectfully agree and adopt what has fallen from His Lordship.* (Emphasis added.)

In Harley, at pp 1770–1771, the Privy Council stated as follows:

> 57. Their Lordships agree with the Court of Appeal's conclusion [1999] 3 NZLR 545, at pp 565–566, para 59, that a duty rests on officers of the court to achieve and maintain appropriate levels of competence and care and that, if he is in serious dereliction of such duty, the officer is properly amenable to the costs jurisdiction of the court. But care must be taken not to assume that just because it appears to the court that the case was hopeless there was a failure by the barrister or solicitor to achieve the appropriate level of competence and care. As Sir Thomas Bingham MR said in *Ridehalgh v Horsefield* [1994] Ch 205, at p 234:
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> > Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is ... for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court ... It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.
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> *The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the court.* (Emphasis added.)

(d) under O 59 r 6(4) RC, the court may direct and authorise the BC to:

(i) attend the costs application; and

(ii) take part in the costs application.

the BC's attendance and participation in a costs application may be important because:

(A) the BC's representative may assist the court to decide whether any one or more of the five defaults have been proven by the applicant in the costs application; and

(B) the BC itself may lodge a complaint with the DB against the Legal Practitioner under s 99(3) of the LPA.

Order 59 r 6(4) of the RC allows the court to order costs to be paid to BC for attending and participating in the costs application; and

(e) O 59 r 6(5) of the RC empowers the court to direct notice of the costs application to be given to the legal practitioner's client. Such a provision may be resorted to for the following reasons:

(i) the court has power under O 59 r 6(1)(a) of the RC to disallow costs as between the legal practitioner and his or her client. Order 59 r 6(1)(b) of the RC also allows the court to direct the legal practitioner to repay to his or her client, costs which the client has been ordered by the court to pay to the other parties to the proceedings. If the court is minded to exercise any of its powers under O 59 r 6(1)(a) and/or (b) of the RC, the court should give notice of the costs application to the legal practitioner's client under O 59 r 6(5) of the RC; and/or

(ii) if the legal practitioner's client is informed of the costs application, the legal practitioner's client may make an informed decision on the following matters:

(A) whether the legal practitioner's client still wishes to retain the services of the legal practitioner;

(B) whether the legal practitioner's client decides to lodge a complaint to the DB against his or her lawyer under s 99(1) of the LPA; and/or

(C) whether the legal practitioner's client intends to commence an action against the legal representative for breach of the retainer contract and/or for the tort of professional negligence.

If notice of the costs application has been given to the legal practitioner's client under O 59 r 6(5) of the RC, he or she may attend the hearing of the costs application as a party but he or she has no right to participate in the costs application (unlike the BC which has the right of audience under O 59 r 6(4) of the RC).

[72] On 19 May 2015:

(a) Mr Chang was represented by learned counsel, Mr Yeoh Cho Kheong ('Mr Yeoh'), for the plaintiff's costs application;

(b) both Mr Oon and Mr Yeoh informed the court that both parties have 'amicably agreed' for Messrs IHSV to bear costs of RM750 for each of the two applications; and

(c) I allowed the plaintiff's costs application and ordered Messrs IHSV to pay the costs of RM750 for each of the two applications.

[73] I am of the opinion that Mr Yeoh has properly conceded that Messrs IHSV should pay the costs of the two applications. This is because I am satisfied that all the three conditions have been fulfilled in these two cases. I start with the first condition. There is clear evidence of the following:

(a) wasting costs by misconduct; and/or

(b) wasting costs by default.

This finding is premised on the following:

(i) Messrs TSOP's letter dated 5 January 2015 has requested for an appointment to be fixed for the court to 'clarify' the terms of the two summary judgments. In view of Messrs TSOP's letter dated 5 January 2015, Messrs IHSV should not have:

(A) drawn up the defendant's draft judgments without the knowledge of Messrs TSOP;

(B) presented the defendant's draft judgments to the SAR without the knowledge of Messrs TSOP; and/or

(C) perfected the defendant's draft judgments without the knowledge of Messrs TSOP;

(ii) this court has fixed 22 January 2015 for me to settle the terms of the two summary judgments in accordance with O 42 rr 8(3) and (4) of the RC. Messrs IHSV should not have extracted the two sealed judgments on 31 January 2015 or at any date thereafter until the court has settled the terms of the two summary judgments;

(iii) upon extraction of the two sealed judgments on 31 January 2015, Messrs IHSV should have sent a copy of the two sealed judgments to Messrs TSOP as soon as reasonably possible;

(iv) Messrs IHSV should not have attempted to include surreptitiously the two sealed judgments in the draft indexes. If not for the vigilance of Messrs TSOP, Messrs TSOP would not have discovered that Messrs IHSV had perfected the defendant's draft judgments behind the back of Messrs TSOP; and/or

(v) after stealing a march on Messrs TSOP by perfecting the defendant's draft judgments without the knowledge of Messrs TSOP, Mr Chang had the temerity to advance the argument based on the *functus officio* doctrine to stifle unlawfully the two applications to amend the two summary judgments based on the two sealed judgments!

[74] I am satisfied that Messrs IHSV and not merely Mr Chang, is overall responsible for the above misconduct and/or default. Hence, the second condition is fulfilled in these two cases.

[75] In respect of the third condition, based on the above misconduct and/or default, it is just and proper for me to exercise my discretion under O 59 r 6(1)(c) of the RC as follows:

(a) the court's discretion should be exercised to impose costs on Messrs IHSV and not on Mr Chang personally;

(b) Messrs IHSV should not bear the entire costs of the two applications as there has been an 'accidental slip or omission' on the part of Messrs TSOP which necessitates an amendment of the two summary judgments under O 20 r 11 of the RC; and

(c) the nature of the above misconduct and/or default by Messrs IHSV is not so severe. Accordingly, the sum of RM750 for each of the two applications is reasonable. This court must express its gratitude to Mr Oon for his magnanimity in accepting these sums proposed by Mr Yeoh. Due to the nature of Messrs IHSV's misconduct and/or default, I have earlier exercised my discretion on 14 May 2015, not to notify BC and the defendant of the plaintiff's costs application.

THE COURT'S DECISION

[76] In view of the above reasons, the two applications are allowed with costs to be borne by the defendant's solicitors.

[77] I fully understand the duty of learned counsel and solicitor to his or her client. Having said that, I remind myself of the Supreme Court's judgment delivered by Mohamed Azmi SCJ in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679, at p 685, that the duty of counsel and solicitor to do justice, is of greater paramount than his or her duty to the client.

Applications allowed, costs borne by defendant's solicitor.

Reported by Ashok Kumar